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IN THE

Supreme Court of the United States

No. 123. October Term, 1937.

HARVEY S. ADAMS, Receiver, Penn National Bank and Trust Company of Reading, Pennsylvania,

Petitioner,

v.

GENEVA M. NAGLE, RALPH S. HILL, JAMES H. PENGELLY and WILLIAM M. MAYER,

Respondents.

No. 124. October Term, 1937.

HARVEY S. ADAMS, Receiver, Reading National Bank and Trust Company of Reading, Pennsylvania,

Petitioner,

v.

J. EDWIN TOBIAS, RALPH S. HILL and OSCAR P. SMITH,

Respondents.

On Petition for Writs of Certiorari to the United States Court of Appeals for the Third Circuit.

Brief of Respondents in Opposition.

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IN THE

Supreme Court of the United States.

No. 123. October Term, 1937.

HARVEY S. ADAMS, RECEIVER, PENN NATIONAL BANK AND TRUST COMPANY OF READING, PENNSYLVANIA,
Petitioner,

v.

GENEVA M. NAGLE, RALPH S. HILL, JAMES H. PENGELLY AND WILLIAM M. MAYER,
Respondents.

No. 124. October Term, 1937.

HARVEY S. ADAMS, RECEIVER, READING NATIONAL BANK AND TRUST COMPANY OF READING, PENNSYLVANIA,
Petitioner,

v.

J. EDWIN TOBIAS, RALPH S. HILL AND OSCAR P. SMITH,
Respondents.

On Petition for Writs of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF OF RESPONDENTS IN OPPOSITION

NON-JOINDER OF APPELLEES.

The appellees in the consolidated cases in the Court below were the Comptroller of the Currency and the respective receivers of each bank. (R. 1.) The decrees of

the Circuit Court of Appeals (R. 96, 97) reversed the orders of the District Court of June 25, 1935 (R. 35, 75) dismissing the bills as to both defendants in each suit, appellees in the court below, and denying the preliminary injunctions. All the appellees joined in the petition for rehearing which was denied. (R. 113.)

The petition for writs of certiorari was filed by the respective receivers of each bank, appellees in the court below. The Comptroller of the Currency, appellee in each case in the court below, did not join as a party to the petition. The record fails to show service of summons and severance upon the Comptroller of the Currency as such appellee in each suit.

It is submitted that the petition therefore should be denied on the authority of *Boynton v. Hutchinson Gas Co.*, 292 U. S. 601, and cases cited.

OPINIONS BELOW.

The opinions of the District Court (R. 27, 33, 71, 74) are not reported. The opinion of the Circuit Court of Appeals (R. 88) is reported in 88 Fed. (2d) 936. The dissenting opinion (R. 94) is reported in 88 Fed. (2d) 940.

JURISDICTION.

The decrees of the Circuit Court of Appeals were entered March 10, 1937 (R. 96, 97). The petition for rehearing was denied April 19, 1937 (R. 113). The petition for writs of certiorari was filed June 8, 1937. The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Is an assessment by the Comptroller of the Currency upon stockholders of a national bank to enforce their statutory liability, subject to a direct attack by a suit in equity for an injunction on the grounds that, under the facts alleged in the bills of complaint and admitted by the motions to dismiss, the determination of the Comptroller was beyond his statutory powers and was arbitrary and capricious?

The Court below answered this question in the affirmative.

STATEMENT.

The facts material for the consideration of the question presented, as alleged in the bills of complaint and admitted by the motions to dismiss, are concisely stated in the opinion of the Circuit Court of Appeals (R. 88-94).

The Statement of Facts in the petition for writs of certiorari, however, contains several inaccuracies, which also pervade the Specification of Errors, the Questions Presented and the Reasons for Granting the Writs of Certiorari, and which respondents deem it necessary to correct.

(a) The petition in its Statement of Facts (p. 6) states: "It was further averred that on January 15, 1935, the Comptroller . . . made an assessment . . . 'upon a proper accounting by the Receiver' and 'upon a valuation of the uncollected assets remaining in his hands' (R. 12, 56)." The reference is to paragraphs 24 of the bills, which allege that on January 15, 1935, the Comptroller made an assessment "wherein he *recited* that upon a proper accounting by the Receiver . . . and upon a valuation of the uncollected assets remaining in his hands",

it was necessary to make the assessment. The bills simply alleged the fact of the assessment and its recitals. The petitioner misconstrues this allegation and mistakenly regards it as an affirmative pleading of the matters recited in the Comptroller's assessment. Such is not the case.

(b) The petition in its Statement of Fact (p. 6) states that the bills of complaint allege "that in arriving at the valuation of the assets and determining insolvency these claims against the Farmers National were disregarded (R. 13, 57)." The reference is to paragraphs 26 of the bills which allege: "The alleged valuation of the remaining assets . . . upon an alleged proper accounting . . . *excluded* as an asset the said claim . . . ."

(c) The petition in its Statement of Facts (p. 6), in purporting to sum up the allegations of the bills, states that "the only contention advanced" is that "the Comptroller failed to give proper value to certain alleged claims of the Penn National and Reading National against the Farmers National which claims, had they been properly evaluated, would have made the assessment unnecessary". There is no foundation for this statement, either in the allegations as they appear in the bills, or as they are misconstrued by the petitioner as pointed out above.

The contention of the respondents, as set forth in detail in the bills of complaint, is not that the Comptroller erred in the exercise of his judgment in the valuation of assets, but that the assessment itself was beyond his statutory powers and was arbitrary and capricious.

ARGUMENT.

For a proper understanding of the petition in connection with the Specifications of Errors, the Questions Presented, and the Reasons for Granting the Writs of Certiorari, as set out therein, it is necessary that the several grounds of the decision of the Court below be stated definitely. The respondents, therefore, submit that the following propositions were decided by the Court below:

First: The statutory liability of stockholders of a national bank is a conditional liability in the sense that it can be enforced only after all the ordinary resources of the bank have been exhausted and that the Comptroller has the power to determine the necessity and amount of the assessments. (R. 91.) This proposition is not challenged in the petition.

Second: The determination of the Comptroller as to the necessity and amount of the assessment is ordinarily conclusive and may not be judicially reviewed (R. 91), nor may it be collaterally attacked. (R. 93.) This proposition is not challenged in the petition.

Third: An assessment upon stockholders by the Comptroller is subject to a direct attack by a suit in equity for an injunction on the ground that it was beyond the statutory powers of the Comptroller and was arbitrary and capricious. (R. 93.) It is difficult to understand from the petition whether this proposition is or is not conceded. Accordingly it will be regarded by the respondents as challenged.

Fourth: The abrogation of the contract of February 17, 1933 and all rights thereunder, and the refusal to en-

force the claims of the two banks, were beyond the statutory powers of the Comptroller and were arbitrary and capricious. (R. 92, 93.) This proposition is challenged in the petition and the construction of the contract of February 17, 1933 by the Court below is alleged as error.

This argument will be confined to the consideration of the third and fourth propositions as set forth above.

I.

An Assessment of Stockholders by the Comptroller Is Subject to a Direct Attack by an Injunction Suit on the Ground That It Was Beyond the Statutory Powers of the Comptroller and Was Arbitrary and Capricious.

The general rule, settled by an unbroken line of authorities beginning with *Kennedy v. Gibson,* 8 Wall. 498, 505, is that the determination of the Comptroller as to the necessity and amount of the assessment is conclusive in an action by the receiver to enforce the statutory liability of stockholders of a national bank.

But a qualification of this general rule, as important as the rule itself, is that the acts of an administrative official may be directly attacked for fraud or errors of law. This was implicit in *Kennedy v. Gibson,* supra, under the doctrine of the supremacy of law over actions of administrative officials. In accordance with that doctrine, it is firmly established that the wrongful action of an administrative official, even though the head of a government department, may be restrained. *Noble v. Union River Logging R. R.,* 147 U. S. 165 (1893); *American School of Magnetic Healing v. McAnnulty,* 187 U. S. 94 (1902); *Philadel-*

phia Co. v. Stimson, 223 U. S. 605 (1912); *Waite v. Macy,* 246 U. S. 606 (1918).

The doctrine as it relates to the power of the Comptroller with respect to an assessment, received its first judicial expression in *United States v. Knox,* 102 U. S. 422-425, a case in which the opinion was written by Mr. Justice Swayne, who also wrote the opinion in *Kennedy v. Gibson.* In *United States v. Knox,* the Court said (p. 425):

> "In the process to be pursued to fix the amount of the separate liability of each of the shareholders it is necessary to ascertain, 1, the whole amount of the par value of all the stock held by all the stockholders; 2, the amount of the deficit to be paid after exhausting all the assets of the bank; 3, then to apply the rule that each shareholder shall contribute such sum as will bear the same proportion to the whole amount of the deficit as his stock bears to the whole amount of the capital stock of the bank at its par value."

After thus defining the power of the Comptroller in making an assessment, the Court went on to state (p. 425):

> "Although assessments made by the Comptroller, under the circumstances of the first assessment in this case, and all other assessments, successive or otherwise, not exceeding the par value of all the stock of the bank, are conclusive upon the stockholders, yet if he were to attempt to enforce one made, clearly and palpably contrary to the views we have expressed, it cannot be doubted that a Court of equity, if its aid were invoked, would promptly restrain him by injunction."

Thus the resultant rule is that the determination of the Comptroller as to the necessity and amount of the assessment, while conclusive in an action by the receiver to en-

force the statutory liability of stockholders, is subject, like other administrative orders, to a direct attack in equity for fraud or errors of law.

In many cases where a receiver has sued to enforce the stockholder's liability and the stockholder has attempted to attack the assessment collaterally, the courts, while refusing to permit the collateral attack, have recognized the right of a stockholder to make a direct attack upon an assessment in a suit in equity for an injunction. *Deweese v. Smith*, 106 Fed. 438, 445 (C. C. A. 8, 1901), affirmed 187 U. S. 637 (1902); *B. V. Emery Co. v. Wilkinson*, 72 Fed. (2d) 10, 12 (C. C. A. 10, 1934); *Crawford v. Gamble*, 57 Fed. (2d) 15, 17 (C. C. A. 6, 1932); *Wilson v. Awalt*, 2 Fed. Supp. 465, 467 (D. C., M. D. Pa. 1933); *Liberty National Bank v. McIntosh*, 16 Fed. (2d) 906, 909 (C. C. A. 4, 1927).

In *Korbly v. Springfield Savings Institution*, 245 U. S. 330, there was a direct attack and the enforcement of an assessment by the Comptroller was restrained as beyond his powers.

The ground for a direct attack on an administrative order in the last analysis is error of law as distinguished from error of fact. Under errors of law may be subsumed administrative acts which are beyond the statutory powers of the official or which are arbitrary and capricious. *Radio Commission v. Nelson Bros. Co.*, 289 U. S. 266, 276; *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 72.

The Court below, in the instant case, in reversing the orders of the District Court, expressly based its decision on the ground that the assessment was beyond the statutory powers of the Comptroller and was arbitrary and capricious. (R. 90, 91, 92, 93, 94.)

The first reason set forth in the petition for granting the writs of certiorari (p. 8, 9) is that the lower Court decided an important question of Federal law in a manner in conflict with applicable decisions of this Court and in conflict with decisions of the Circuit Court of Appeals, including the Third Circuit, "upon the question of the right of shareholders in national banking associations to inquire into the correctness of the official determinations and findings of the Comptroller of the Currency as to insolvency and the necessity for an assessment."

No such question is raised by the allegations of the bills, nor did the Court below rest its decision on any such basis. Furthermore, the petition does not specify any error of the Court below in that respect.

The petition states (p. 10): "The effect of the decision in this case is to permit an inquiry by the stockholders as to the correctness of the Comptroller's decision and official determination of insolvency and the necessity for an assessment . . . ." But the effect of the decision is not to permit an inquiry into the correctness of an assessment, but is, on the contrary, to annul and set aside altogether an assessment which is beyond the statutory powers of the Comptroller and which is arbitrary and capricious.

The petition, like the dissenting opinion, apparently relies on the proposition that the recitals contained in the assessment of the Comptroller are conclusive. It is conceded that this is so in a case where the assessment is within the statutory authority of the Comptroller, but the rule does not apply where, as in the instant case, he exceeds his authority and acts in an arbitrary and capricious manner.

This Court in *Morgan v. United States*, 298 U. S. 468, 477, in speaking of an order of the Secretary of Agriculture under the Packers and Stockyards Act, said (p. 477):

> ". . . When the Secretary acts within the authority conferred by the statute, his findings of fact are conclusive . . . But in determining whether in conducting an administrative proceeding of this sort the Secretary has complied with the statutory prerequisites, the recitals of his procedure cannot be regarded as conclusive. Otherwise the statutory conditions could be set at naught by mere assertion . . . "

The contention that the decision of the Court below is in conflict with applicable decisions of this Court, and in conflict with decisions of the Circuit Court of Appeals, including the Third Circuit, is not sound. That contention is the result, first, of a failure to recognize that an assessment by the Comptroller is subject to a direct attack on the ground that the assessment was beyond his statutory powers and was arbitrary and capricious, and, second, in assuming that the effect of the allegations of the bills and the decision of the Court below, is to permit an inquiry into the correctness of the Comptroller's determination. It is clear that the allegations of the bills and the decision of the Court below are based upon the ground that the assessment by the Comptroller was beyond his statutory authority and was arbitrary and capricious.

This failure of the petition to recognize the right of stockholders to make a direct attack upon an assessment by the Comptroller has led counsel to cite as authorities allegedly in conflict with the decision of the lower Court, cases in which stockholders attempted to defend actions by receivers to enforce the statutory liability. In such cases the determination of the Comptroller is conclusive and is not subject to collateral attack. Apart from those cases, which have no application, counsel has failed to point out

any holding in any case which can be regarded as in conflict with the decision of the lower Court.

II.

The Court Below Was Not in Error in Holding That the Comptroller Had No Power to Set Aside and Abrogate the Executed Agreement of Transfer of Assets and Assumption of Liabilities.

The second reason advanced in the petition involves the interpretation of the contract of February 17, 1933 (Exhibit A, R. 15, 60). The contention of the petition on this point is not clear, but it would appear to be that the transfer of assets by the Penn Bank and Reading Bank to the Farmers Bank, and the assumption of the liabilities by the latter, came within the provisions of the National Bank Act as to consolidation of national banks, that such transfer of assets did not comply with the statutory requirements as to consolidation, that therefore the Comptroller had the power to set aside and abrogate the transfer, and that consequently the Court below erred in holding that the Comptroller had no power so to do. The petition mistakenly regards the decision of the Court below as holding "in effect" that the contract "created a merger or consolidation of the banks which the Comptroller could not set aside" (Specification of Error No. 5, P. 7). But the Court below did not so hold. The Court properly disregarded entirely that part of the contract of February 17, 1933, which related to the merger and which was immaterial to the issue.

The contract consisted of two agreements: first, an agreement of the Penn Bank, Reading Bank and Farmers Bank to merge under the name of Farmers Bank, and sec-

ond, the agreement of Penn Bank and Reading Bank with Farmers Bank to transfer and assign all the assets of Penn and Reading Banks to Farmers Bank conditioned upon the assumption by Farmers Bank of all their liabilities.

The first agreement contemplated a merger or consolidation under statutory provisions (*12 U. S. C. Section 33*). This agreement was never completed. The second agreement was a present transfer of the assets of Penn Bank and Reading Bank, both on the verge of insolvency, by resolution of their boards of directors conditioned upon the assumption of their liabilities by Farmers Bank. This agreement was within the powers of a national bank under the statutory provisions which confer on a national bank the power to exercise by its board of directors "all such incidental powers as shall be necessary to carry on the business of banking" (*12 U. S. C. Section 24, seventh*). This agreement was fully completed and executed. The assets were transferred and the liabilities assumed.

The petition fails to recognize that one contract may contain two agreements, either dependent upon or independent of each other. The first agreement to merge or consolidate was dependent upon the performance of the second agreement to transfer the assets, but the second agreement was in no wise dependent upon the completion of the first agreement to consolidate. The lower Court therefore was not in error in ignoring the first agreement to merge or consolidate. It had no bearing whatsoever upon the rights of the parties, which had already accrued under the second agreement, in conformity with which the assets had been transferred and the liabilities assumed.

It has been repeatedly held that a transfer of assets, in consideration of the assumption of liabilities, of a na-

tional bank on the verge of insolvency, to another national bank by virtue of resolutions of the boards of directors, is legal and not ultra vires of either bank. *City National Bank of Huron v. Fuller,* 52 Fed. (2d) 870 (C. C. A. 8, 1931); *B. V. Emery & Co. v. Wilkinson,* 72 Fed. (2d) 10, (C. C. A. 10, 1934); *Hays v. Wilkinson,* 72 Fed. (2d) 201; (C. C. A. 10, 1934); *Richter v. Laredo National Bank,* 62 Fed. (2d) 289, (C. C. A. 5, 1932); *Aberly v. Craven County,* 70 Fed. (2d) 52, (C. C. A. 4, 1934); *Wannamaker. v. Edisto National Bank,* 62 Fed. (2d) 696, (C. C. A. 4, 1933).

The executed agreement to transfer the assets was consistent with the policy and provisions, express or implied, of the National Bank Act, and was therefore subject to state laws. *Jennings v. U. S. F. & G. Co.,* 294 U. S. 216, 219. Under the law of Pennsylvania where one transfers all his property to another who agrees to pay all the debts of the transferror, not only the transferror but all creditors of the transferror have a direct claim against the transferee as beneficiaries of the contract. *Mitchell, Receiver of Liberty Clay Products Co.,* 291 Pa. 282, and cases cited.

Such an agreement of transfer of assets and assumption of liabilities did not require the approval of the Comptroller of the Currency to give it legal effect. As a matter of fact, however, it was alleged in the bills (Pars. 9; R. 6, 51) and not denied, that the transfer of assets and assumption of liabilities was "with the knowledge, approval, and acquiescence of the Comptroller of the Currency". It was also alleged in the bills and admitted by the motions, that the supplemental contract of February 20, 1933 (Exhibits B, R. 18-19; 63-64) executed by the banks to supplement the contract of February 17, 1933, was en-

tered into "at the direction of the Comptroller of the Currency". (Pars. 7; R. 6, 50). It was also alleged and admitted that thereafter the Comptroller administered the transferred assets. (Pars. 16; R. 9, 53.)

The Comptroller had no power to set aside the executed agreements of transfer. As the Court below said (R. 90), "Congress did not give him such power. No principle of law, which, in our opinion, authorizes the Comptroller to do this has been cited by counsel or the Court below."

The contention of the petition that the Comptroller had the right to set aside the executed transfer of assets because there was no legal consolidation is therefore without merit, and the Court below made no error in ignoring the question of the agreement of merger or consolidation of the three banks.

Conclusion.

The third, fourth and fifth reasons advanced in the petition are not separately discussed by respondents because they contain, in somewhat modified form, the same contentions which are set forth in the first reason and which have been fully answered.

The decision below is correct. There is no conflict with decisions of this Court or with Circuit Courts of Appeals, including the Third Circuit. The case presents no unsettled principle of general importance, but turns largely on its own facts.

Regardless of the merits of the reasons assigned in the petition for granting the writs of certiorari, the non-joinder

of the Comptroller of the Currency, appellee in each case in the Court below, is sufficient to defeat the petition.

The petition for writs of certiorari should be denied.

Respectfully submitted,

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